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Administration of justice at the United Nations

Administration of justice: further information requested by the General Assembly

Note by the Secretary-General

Summary

The Secretary-General hereby provides the further information requested by the General Assembly in its decision 62/519. In addition, the draft statutes of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal are attached to the present note as annexes I and II, respectively, as requested by the General Assembly in its resolution 62/228. The information and the draft statutes presented incorporate input provided by staff representatives through the contact group on the administration of justice, established at the twenty-eighth session of the Staff-Management Coordination Committee.

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I. Introduction

1. In its resolution 61/261, the General Assembly welcomed the report of the Redesign Panel on the United Nations system of administration of justice (A/61/205) and the note by the Secretary-General (A/61/758) thereon, and decided to establish a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice to be implemented no later than January 2009.

2. In his report on the administration of justice (A/62/294), the Secretary-General provided supplementary details and background on the proposed new system, as well as detailed financial implications for the introduction of the new system.[1] During its sixty-second session, the General Assembly considered the report, together with the related report of the Advisory Committee on Administrative and Budgetary Questions (A/62/7/Add.7).

3. The Sixth Committee considered the legal aspects of the report of the Secretary-General (A/62/294) and issued conclusions (A/C.5/62/11, annex, appendix I) which were noted by the General Assembly in its decision 62/519. By the same decision, the General Assembly established an Ad Hoc Committee on the Administration of Justice at the United Nations to continue the work on the legal aspects of the administration of justice, and requested the Secretary-General to respond to the requests for further information contained in the Sixth Committee conclusions, taking into account any further decisions that the General Assembly might take during its sixty-second session prior to the meeting of the Ad Hoc Committee.

4. The General Assembly, by its resolution 62/228, established the basic framework of the new system of administration of justice and requested further information (paras. 65-67). A number of the items on which the Secretary-General was requested to report have been included in the draft statutes of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, which were specifically mentioned by the General Assembly (paras. 65 (a) and (b)). The other information requested by the General Assembly in its resolution 62/228 will be provided by the Secretary-General in separate reports to be issued in accordance with the time frames indicated by the Assembly. In the same resolution, the General Assembly invited the Sixth Committee to consider the legal aspects of the reports to be submitted by the Secretary-General, without prejudice to the role of the Fifth Committee as the Main Committee entrusted with responsibilities for administrative and budgetary matters (para. 68).

5. As the Ad Hoc Committee is scheduled to meet from 10 to 18 and on 21 and 24 April 2008, section II of the present note sets out the Secretary-General's responses to the Sixth Committee's requests for information and section III contains a discussion of the draft statutes of the Dispute Tribunal and the Appeals Tribunal, which are contained in annexes I and II, respectively.

[1] During the sixty-first session of the General Assembly, the Secretary-General also issued a report (A/61/891) on the resources required for the implementation of resolution 61/261, and the Advisory Committee on Administrative and Budgetary Questions submitted its comments on that report (see A/61/936). However, two reports were not considered by the Fifth Committee during the sixty-first session.

6. The present note takes into account consultations with staff representatives through the contact group on the administration of justice, established at the twenty-eighth session of the Staff-Management Coordination Committee (see A/62/294, paras. 32, 52 and 103).

7. The Secretary-General considers that the General Assembly's review of the information provided in the present note concerning the proposed new justice system will allow him to be in a position to plan for full implementation of the new system in January 2009.

II. Responses to the requests for further information

A. Proposed scope of new system of administration of justice

8. The General Assembly requested further information on four specific points, concerning non-staff personnel (see resolution 62/228, para. 66):

(a) The different categories of non-staff personnel performing personal services for the Organization, including experts on mission, United Nations officials other than staff members of the Secretariat and daily workers;

(b) The types of dispute settlement mechanisms available to the different categories of non-staff personnel and their effectiveness;

(c) The types of grievances the different categories of non-staff personnel have raised in the past and what bodies of law are relevant to such claims;

(d) Any other mechanism that could be envisaged to provide effective and efficient dispute settlement to the different categories of non-staff personnel, taking into account the nature of their contractual relationship with the Organization.

1. Consultants, individual contractors and individuals engaged under service contracts

(a) Status and contractual terms

9. The roles of consultants and individual contractors are set out in section 1 of administrative instruction ST/AI/1999/7, on consultants and individual contractors, as amended, as follows:

(a) A consultant is an individual who is a recognized authority or specialist in a specific field, engaged by the United Nations under temporary contract in an advisory or consultative capacity to the Secretariat;

(b) An individual contractor is an individual engaged by the Organization from time to time under temporary contract to provide expertise, skills or knowledge for the performance of a specific task or piece of work against payment of an all-inclusive fee.

10. In addition, individuals hired as consultants must not perform the functions of a staff member or have any representative or supervisory responsibility. They are neither "staff members" under the Staff Regulations and Rules of the United Nations nor "officials for the purposes of the Convention on the Privileges and Immunities

of the United Nations". However, consultants and individual contractors may be given the status of experts on mission under section 22 of the Convention.

11. Consultants and individual contractors are engaged under contracts entered into by the Organization directly with the individuals concerned, the terms and conditions of which are set out in annex A to ST/AI/1999/7. The terms and conditions of service of personnel under service contracts and special service agreements (used by some of the funds and programmes) are also stipulated in their respective contracts and the applicable conditions of service or general conditions.

(b) Dispute settlement mechanisms

12. Under the General Conditions of Contracts for the Services of Consultants or Individual Contractors (see ST/AI/1999/7/Amend.1, annex), disputes arising out of the contractual terms of consultants and individual contractors should first be addressed through amicable settlement efforts, including conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law (UNCITRAL). Should the dispute not be resolved through those means, either party may refer the matter to arbitration under the UNCITRAL Arbitration Rules.[2]

13. Disputes arising out of the contractual terms of individuals engaged under service contracts (used by some of the funds and programmes) should also first be addressed through amicable settlement efforts, including conciliation under the UNCITRAL Conciliation Rules. Should the dispute not be resolved through those means, either party may refer the matter to arbitration under the UNCITRAL Arbitration Rules.

14. The majority of disputes involving consultants, individual contractors and individuals engaged under service contracts can be resolved amicably at the initial informal phase. Generally, the parties enter into a settlement agreement.

15. Conciliation is rarely used as a means of redress by the claimants or the Organization. This may be a result of the fact that conciliation is not necessarily binding on the parties, leading to the perception that the process adds little value. If negotiations towards settlement fail, arbitration is initiated as a last resort. Very few disputes escalate to this level. From 1996 to 2006, 16 claims by consultants or individual contractors were referred to the Office of Legal Affairs, of which only two proceeded to arbitration (see A/62/294, para. 20).

16. There have been instances in which consultants and individual contractors have filed lawsuits directly with national courts, alleging the application of national labour law. Where such cases are filed in consultation with the Office of Legal Affairs, the Organization requests that the local authorities assert the immunity of the Organization to have such cases dismissed, pointing out that the individuals have adequate recourse through the dispute resolution mechanisms articulated in the contract (i.e., conciliation and arbitration under UNCITRAL rules).

17. In addition, consultants, individual contractors and individuals under service contracts may file complaints of workplace harassment, sexual harassment or abuse of authority against staff members. The Organization's policy on protection against retaliation also permits non-staff personnel to report allegations of retaliation on the

[2] For background information regarding the use of ad hoc arbitration as the mode of resolving disputes of this nature, see A/62/294, paras. 19 and 20.

part of staff members (see ST/SGB/2005/21, on protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations). Reports are addressed under the Organization's established rules and procedures.

18. Non-staff personnel, including consultants, individual contractors and individuals under service contracts, may also seek the services of the Office of the Ombudsman, which, in a number of instances, has assisted the parties in reaching mutually acceptable solutions.

(c) Types of grievances and bodies of law applicable

19. Consultants and individual contractors, as well as individuals under service contracts (used by some of the funds and programmes) raise a diverse range of grievances. These include the non-renewal or termination of contracts and a variety of entitlement-related claims. The grievances raised by consultants and individual contractors in the 16 arbitral claims which were referred to the Office of Legal Affairs from 1996 to 2006 concerned issues relating to one or more of the following: (a) claims for alleged non-payment of fees under the contracts; (b) claims that consultants and individual contractors should be provided with the same terms and conditions of employment as United Nations staff members; and (c) claims relating to termination or non-extension of contracts. Further information concerning grievances is contained in section 6 below.

20. The applicable contractual terms for consultants and individual contractors are set out in the General Conditions of Contracts for the Services of Consultants or Individual Contractors (see ST/AI/1999/7/Amend.1, annex). For personnel under service contracts and special service agreements, the relevant terms and conditions are set out in their contracts, as well as in the conditions of service applicable to service contract holders or in the general conditions applicable to special service agreements.

21. Under their contracts, consultants and individual contractors are required to abide by certain standards of conduct in connection with their service for the United Nations, including compliance with the standards of conduct set forth in ST/SGB/2003/13, on special measures for protection against sexual exploitation and sexual abuse. Unsatisfactory performance or failure to comply with the required standards of conduct shall lead to termination of service for cause, at the initiative of the United Nations (see sect. 5.16 of ST/AI/1999/7 and the General Conditions). The United Nations also has the right to refer any alleged breach of the standards of conduct to the relevant national authorities for appropriate legal action.

22. With respect to the law applicable to arbitral claims, the Organization reviews such claims in the light of the applicable contractual terms as well as general principles of international law. As an intergovernmental Organization with 192 Member States, the United Nations takes the view that its contracts and agreements should not be subject to the laws of any one jurisdiction, but should respect general principles of international law. Therefore, the General Conditions do not include a choice of law provision but stipulate that the "decisions of the arbitral tribunal shall be based on general principles of international commercial law".

2. United Nations Volunteers

(a) Status and conditions of service

23. United Nations Volunteers are individuals who work with United Nations agencies, governmental and non-governmental organizations on a voluntary and short-term basis. They are engaged pursuant to the Conditions of Service for International United Nations Volunteers and are not employees or staff members.

24. United Nations Volunteers do not receive salaries but do receive benefits in connection with their assignment, including a monthly volunteer living allowance; annual leave entitlements; travel expenses; insurance coverage; and settling-in and resettlement grants.

(b) Dispute settlement mechanisms

25. United Nations Volunteers may appeal to the United Nations Volunteers Executive Coordinator and, subsequently, to the Administrator of the United Nations Development Programme (UNDP). If a volunteer wishes to contest the Administrator's decision concerning his or her appeal, the matter is sent to arbitration conducted under the UNCITRAL Arbitration Rules (see para. 12 above). Volunteers may also seek informal mediation and resolution of matters that are relayed through the Office of the Joint Ombudsman to United Nations Volunteers Headquarters.[3]

26. United Nations Volunteers may also file complaints of workplace harassment, sexual harassment or abuse of authority against staff members. UNDP policy on protection against retaliation also permits United Nations Volunteers to report allegations of retaliation on the part of staff members. Such reports are then addressed under the established rules and procedures of UNDP.

(c) Types of grievances and bodies of law applicable

27. The two broad categories of grievances received from United Nations Volunteers relate to administrative decisions on volunteer conditions of service and misconduct. Further information concerning grievances lodged by United Nations Volunteers is contained in section 6 below.

28. The relevant body of law is the Conditions of Service for International United Nations Volunteers. General principles of international law would also be considered in any claim referred to arbitration (see para. 22 above).

3. Officials other than Secretariat officials

(a) Status and terms of appointment

29. "Officials other than Secretariat officials" are persons who, at the directive of the legislative organs, perform specific functions for the Organization on a substantially full-time basis. Officials other than Secretariat officials are appointed by the legislative organs rather than by the Secretary-General. They are not staff members, but have the status of "officials" of the Organization under Articles V and VII of the Convention on the Privileges and Immunities of the United Nations (the

[3] See appendix XVI of the Conditions of Service for International United Nations Volunteers, available from the United Nations Volunteers website.

General Convention), and are accorded privileges and immunities thereunder. The following persons are recognized by the General Assembly as "officials" under the General Convention, and are paid a remuneration fixed by the General Assembly:

- The Chairman of the Advisory Committee on Administrative and Budgetary Questions
- The Chairman and the Vice-Chairman of the International Civil Service Commission
- Inspectors of the Joint Inspection Unit (11 members)[4]

(b) Dispute settlement mechanisms

30. The Secretary-General reports periodically on the conditions of service and compensation of some of those officials for the approval of the General Assembly. However, since the officials are appointed by the legislative organs, the Secretary-General is not privy to the detailed terms of engagement governing their service, including any provision concerning settlement of disputes.

31. Officials other than Secretariat officials are accountable to the Organization for the proper discharge of their functions.[5] As the terms and conditions of service of "officials other than Secretariat officials", including the recourse mechanism or procedure, are established by the appointing bodies, it would be for them to establish a recourse mechanism or procedure that would be applicable to those individuals. However, the Secretariat is not aware of any established or specified recourse mechanism or procedure applicable to these officials, with the exception of members of the Joint Inspection Unit. The United Nations Administrative Tribunal has recognized the standing of members of the Joint Inspection Unit who are "officials other than Secretariat officials",[6] at least in respect of the entitlements granted by the General Assembly to those officials.

(c) Types of grievances and bodies of law applicable

32. No records are maintained concerning the grievances raised by this category of non-staff personnel. The bodies of law relevant to these claims are the terms and conditions of the appointment as established by the appointing authority, and the Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission (see ST/SGB/2002/9).

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[4] See article 13 of the statute of the Joint Inspection Unit, which provides that "inspectors shall have the status of officials of the United Nations. They shall not be considered to be staff members".

[5] See regulation 3 on accountability in the Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission, contained in Secretary-General's bulletin ST/SGB/2002/9 of 18 June 2002. See also the commentary to regulation 3, which provides that the accountability of officials other than Secretariat officials and experts on mission would be a matter for the appointing authority:

> "Regulation 3, which is similar to staff regulation 1.3(a), makes it clear that officials and experts on mission are accountable for their actions. The method of accountability may vary. For officials appointed by the General Assembly, that accountability would be a matter for the Assembly. For experts on mission, it would be the Secretary-General or the appointing authority who could terminate an assignment or otherwise admonish the expert.

[6] See Judgement No. 1074 (2002), *Hernandez-Sanchez*.

4. Experts on mission

(a) Status and terms of appointment

33. Individuals performing functions for the United Nations who are not "officials" or staff members may be accorded the status of "experts on mission" under section 22 of the General Convention. "Experts on mission" may be issued either a service contract or a contract for consultants and individual contractors, both of which set out the conditions of service and the assigned tasks. Consultants and individual contractors may be given the status of "experts on mission" if they are designated by United Nations organs to carry out missions or functions for the United Nations (see ST/AI/1999/7/Amend.1, annex). While experts on mission are not staff members, they are accorded privileges and immunities under articles VI and VII of the General Convention.

34. The information on experts on mission provided in paragraphs 35 to 38 below relates to the following experts, who do not serve under a contract as a consultant or individual contractor:

- International Law Commission (34 members)
- Advisory Committee on Administrative and Budgetary Questions (other than the Chairman) (15 members)
- International Civil Service Commission (other than the Chairman and Vice-Chairman) (13 members)
- International Narcotics Control Board (13 members)
- Special rapporteurs, independent experts and special representatives appointed under mandates of the Commission on Human Rights which were subsequently assumed by the Human Rights Council (34)
- Committee on Contributions (18 members)
- Military observers and civilian police personnel in peacekeeping missions (12,121 as at 31 December 2007)
- Experts appointed by the Committee on the Elimination of Discrimination against Women, who carry out advisory missions in their personal capacity.

(b) Dispute settlement mechanisms

35. Experts on mission holding a consultant contract may avail themselves of the dispute settlement clause provided for in that contract (i.e., normally by amicable settlement, including conciliation under the UNCITRAL Conciliation Rules, and, if that is not successful, by arbitration in accordance with the UNCITRAL Arbitration Rules).

36. With the exception of experts on mission holding consultant contracts, the Secretariat is not aware of any established or specified recourse mechanism or procedure applicable to experts on mission. The terms and conditions of service of other experts on mission, including any recourse mechanism or procedure, are established by the appointing body.

37. "Experts on mission" remain accountable to the Organization for the proper discharge of their functions. However, in certain cases (United Nations police,

formed police units and United Nations military observers), these individuals remain under the jurisdiction of their own country. This means that while the Organization's disciplinary directives apply to these individuals, the Organization is limited in the actions it can take, should the relevant standards of conduct be violated.

(c) Types of grievances and bodies of law applicable

38. Records concerning the grievances raised by this category of non-staff personnel are not maintained. The bodies of law relevant to these claims are the terms and conditions of the appointment as established by the appointing body and the Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission (see ST/SGB/2002/9).

5. Daily paid workers

(a) Status and terms of appointment

39. Daily paid workers were initially engaged in some peacekeeping missions for occasional work (unloading boats, trucks and so forth), but the practice has been extended informally to include work that needs to be done on a continuing basis, particularly in cases where there is little or no possibility of outsourcing locally.

40. The Department of Field Support is working with the missions concerned to eliminate this practice by the end of 2008. To the extent that appropriate posts exist on the staffing table, daily paid workers performing skilled functions required on a continuing basis will be given regular staff contracts; those performing functions that are not required on a continuing basis will be engaged as individual contractors. Missions will explore the feasibility of outsourcing other work. To meet the needs of missions for occasional workers, the Department, together with the Office of Human Resources Management, will develop a contract for occasional workers to be used when there is an occasional need for the personal services of an individual on an hourly basis, not to exceed 40 hours per month. The contract will clearly specify the individual's status and coverage in the case of service-incurred injury or death. It will also include a provision on means of recourse.

41. In the event that the daily paid worker category of personnel is not completely eliminated by the end of 2008, support will be required from the General Assembly for approving posts requested by missions for continuing the functions being performed by daily paid workers or individual contractors. While outsourcing will continue to be explored as an option, the Department has indicated that it is often not possible or feasible to outsource in post-conflict environments.

42. With regard to the funds and programmes, the United Nations Office for Project Services (UNOPS) engages daily paid workers on the basis of oral agreements with local community leaders. With respect to UNDP and the Office of the United Nations High Commissioner for Refugees (UNHCR), these or similar arrangements may exist in the field but are neither endorsed nor condoned by headquarters.

(b) Dispute settlement mechanisms

43. Daily paid workers currently have no established recourse mechanism. However, like all other personnel in a mission, they are aware of United Nations standards of conduct and, in particular, the code of conduct on sexual exploitation and abuse. They are aware that they have the right to complain. Missions will be reminded by the Department of Field Support to establish special briefing sessions to better inform daily paid workers of their rights and access to complaint mechanisms. The new contract being developed by the Office of Human Resources Management and the Department of Field Support to meet the needs of missions for occasional workers would address this issue by including a provision on means of recourse.

44. In UNOPS, disputes are resolved using traditional methods involving community participation.

(c) Types of grievances and bodies of law applicable

45. The Department of Field Support does not maintain records of the types and number of grievances raised by daily paid workers. In most cases, missions settle such grievances locally. However, there have been instances in which complaints raised by daily paid workers concerning alleged misconduct on the part of United Nations staff members have resulted in appropriate action (including disciplinary action) being taken by the administration against those staff members. Such alleged misconduct has included sexual exploitation and abuse and abuse of authority and extortion. In those cases, action taken against United Nations personnel was in accordance with the Staff Regulations and Rules and relevant administrative issuances.

6. Additional information

(a) Office of the Ombudsman (Secretariat)

46. The Office of the Ombudsman can consider any United Nations employment-related issue, regardless of the contractual arrangement or status of the person concerned. The report of the Secretary-General on the activities of the Ombudsman (A/62/311) show the breakdown of cases brought to the Ombudsman by occupational category. The category "Other" includes national staff, former staff, retirees, interns, consultants and individual contractors. Excepting national staff, former staff and retirees from this category, the remaining group could be considered as non-staff personnel for the purpose of the present report.

47. From its inception until 31 December 2007, the Office of the Ombudsman dealt with 136 of 2,945 cases relating to this group of non-staff personnel.

(b) Office of the Joint Ombudsperson (funds and programmes)

48. The terms of reference of the Office of the Joint Ombudsperson provide that the services of the Ombudsperson are available to staff members and holders of contracts from UNDP, the United Nations Population Fund, the United Nations Children's Fund and UNOPS and related subprogrammes who are on active duty. Non-staff personnel, particularly those in the field, have sought the services of the Office. Categories of non-staff include service-contract holders, consultants and United Nations Volunteers.

49. In 2006, 8 United Nations Volunteers, 17 consultants and 45 service-contract holders contacted the Joint Ombudsperson in connection with, inter alia, (a) interpersonal problems; (b) abuse of authority and violations of standards of conduct; (c) performance disagreements; (d) unfair termination; (e) working conditions; and (f) entitlement-related issues.

50. In a number of cases concerning non-staff personnel, the Office of the Joint Ombudsperson helped to bring about a mutually acceptable solution through mediation. Had the non-staff personnel been barred from access to the informal system, the only alternative would have been to proceed to arbitration. Many non-staff personnel indicated their desire to explore all possible means in order to avoid lengthy and costly arbitral proceedings.

51. Cases resolved through mediation included cases relating to financial compensation for work completed, clarification of inappropriate behaviour, relationships involving evaluative authority and interpersonal problems.

7. Alternative dispute resolution mechanisms for non-staff personnel

52. In his note, the Secretary-General recommended that the following individuals have access to the informal and formal system of justice: (a) staff members; (b) former staff members and persons making claims in the name of deceased staff members; and (c) all persons who perform work by way of their own personal service for the Organization, no matter the type of contract by which they are engaged, but not including military or police personnel in peacekeeping operations, volunteers (other than United Nations Volunteers), interns, type II gratis personnel (as defined in administrative instruction ST/AI/1999/6), or persons performing work in conjunction with the supply of goods or services extending beyond their own personal service or pursuant to a contract entered into with a supplier, contractor or consulting firm (A/61/758, para. 10; see also A/62/294, paras. 13, 14 and 16).

53. In paragraph 66 (d) of its resolution 62/228, the General Assembly requested the Secretary-General to provide further information and recommendations on any other mechanism that could be envisaged to provide effective and efficient dispute settlement to the different categories of non-staff personnel, taking into account the nature of their contractual relationship with the Organization.

54. The Secretary-General has in the past expressed the view that disputes involving non-staff personnel would be more effectively addressed if such personnel were to have access to the same justice system as staff members (A/62/294, para. 18). However, it has been recognized that providing such access could present certain difficulties, particularly with regard to the ability of the formal system to address the various contractual terms and conditions of service relating to non-staff personnel. While equal access to the informal system is feasible and desirable, separate formal mechanisms for the resolution of disputes may be required in order to deal effectively with the various bodies of law applicable to staff members and non-staff personnel.

55. Any alternative mechanism for non-staff personnel should place substantial emphasis on the informal resolution of disputes. This has proved to be a successful way of resolving disputes at an early stage, as well as appropriate to the nature of the service of non-staff personnel. Therefore, any alternative mechanism should provide non-staff personnel with full access to the new informal system of justice at

the United Nations, including the Office of the Ombudsman and its Mediation Division.

56. With regard to formal mechanisms, a separate formal system could be established to resolve disputes involving non-staff personnel. The Secretary-General considers that any such formal system should provide less lengthy and complex procedures than those of the formal system established for staff members. These procedures should also take into account the contractual terms or conditions of service applicable to the individual concerned.

57. An internal standing body could be established which would have powers similar to those of the United Nations Dispute Tribunal and which would make binding decisions in disputes concerning non-staff personnel, using streamlined procedures. The decisions of the standing body would be final and not subject to appeal. However, while the objective of the internal standing body would be to provide a simplified and expedited mechanism for the resolution of disputes involving non-staff personnel, it is possible that such a body would not be sufficiently different from the United Nations Dispute Tribunal and/or the United Nations Appeals Tribunal to justify the costs of its establishment.

58. In order to review the feasibility of establishing such an internal standing body, detailed proposals would have to be developed concerning, inter alia, the composition, powers, location, administrative and financial arrangements and resource requirements. Before developing further proposals in this regard, the Secretary-General will seek the views and guidance of the General Assembly as to whether the proposal should be further pursued.

59. The Secretary-General has stated that a decision to extend the scope of the new internal justice system to those non-staff personnel appointed to a remunerated post would require specific approval by the Assembly or the principal organ concerned, as the appointing body (A/61/758, para. 11). Similar considerations would apply to the adoption of any proposed alternative dispute resolution mechanisms for those same individuals.

B. Legal assistance for staff

60. In its conclusions, the Sixth Committee stated:

> "Further information is requested on the specific barriers which make it difficult for staff within the United Nations system to be able to access the services of private lawyers, as well as those which limit the ability of private lawyers to be able to serve the needs of staff within the United Nations system, and on what means are potentially available to improve or expand their ability to do so. Further information is also requested on how the issue of legal advice and representation for employees is addressed by other international organizations." (A/C.5/62/11, annex, appendix I, para. 7)

1. Specific barriers which make it difficult for staff within the United Nations system to be able to access the services of private lawyers

61. Staff members at Headquarters are able to access the services of private lawyers to deal with matters relating to state or federal law of the United States of

America, regarding, for example, real-estate transactions, wills and trusts and financial transactions, without any involvement by the United Nations.

62. There are many barriers, however, to staff engaging private lawyers to handle issues relating to their employment at the United Nations (see paras. 63-66 below). Such problems are exacerbated when staff members serve outside the major duty stations, especially in the field. At present, more than 50 per cent of Secretariat staff serve in field missions administered by the Department of Peacekeeping Operations and the Department of Field Support (see A/62/315, para. 11). Private lawyers in such duty stations are often in short supply or unfamiliar with administrative law at the United Nations. Moreover, it may be difficult for staff members to contact private lawyers at their parent duty station while they are on a field mission, as they may have access to information regarding lawyers only from telephone directories and the Internet and may be unable to meet with a private lawyer in person.

2. Specific barriers which limit the ability of private lawyers to be able to serve the needs of staff within the United Nations system

63. Recourse to private lawyers for matters relating to employment at the United Nations is impractical and frequently counterproductive. Providing legal assistance to staff members requires familiarity with the unique legal framework of the United Nations, including United Nations regulations and rules, mechanisms and judicial institutions, as well as the jurisprudence of the United Nations Administrative Tribunal, all of which are wholly distinct from national laws and national courts. Neither formal legal training nor the practice of law in national jurisdictions provides private lawyers with the theoretical or practical experience necessary for them to act as effective advocates for staff within the United Nations system.

64. As a result, private lawyers may either misunderstand the relevant legal principles at issue or attempt to apply national or local legal principles which are not relevant to the United Nations context. In disciplinary cases, for example, private lawyers representing United Nations staff members in New York often attempt to apply the rules of the United States regarding criminal law, such as the Fifth Amendment to the Constitution, setting out the privilege against self-incrimination, which has no applicability in an administrative law regime where no criminal penalties may be incurred.

65. The views of private lawyers on essential matters, such as when the right to counsel attaches, which documents must be produced by the Organization upon request and what investigative techniques are permitted, may also be shaped by their understanding of domestic criminal procedure, which is inapposite because the determination of questions of due process in the United Nations context is governed by United Nations administrative law, including the Staff Regulations and Rules and other administrative issuances. Without a basic understanding of this fundamental point, private lawyers are inclined to prepare, often at great expense, briefs that are legally immaterial to United Nations proceedings and that do not advance the cause of the staff member retaining them.

66. While former staff members may have sufficient familiarity with United Nations administrative law to serve as effective advocates, their fees may be prohibitively high for most staff members, in particular those who are summarily dismissed, and local staff members in field missions. Moreover, such counsel are virtually unavailable outside New York, Vienna and Geneva.

3. Potentially available means to improve the opportunity and ability of outside attorneys to represent staff members in the internal appeals system

67. At present, any outside attorney is allowed to represent a staff member before the joint appeals and disciplinary bodies and the United Nations Administrative Tribunal. It is envisaged that the new procedures will also allow for staff members to appoint an outside attorney. Certain internal recourse procedures, such as those applicable to the proceedings of the Advisory Board on Compensation Claims, do not currently allow for outside representation and it is not anticipated that the reform will have an impact on them. Even when an outside attorney represents a staff member, the Panel of Counsel usually spends considerable time briefing that attorney on both procedures and substantive law. The Panel of Counsel has often had to completely rewrite the submission to avoid rejection by the relevant Tribunal.

68. One way of improving the ability of outside attorneys to provide legal services to staff would be for the Organization to offer training courses to individuals representing staff members before the various recourse bodies. The issue of training, and other issues concerning the mandate of the Office of Staff Legal Assistance, would be reviewed by the General Assembly at its sixty-third session, pursuant to paragraph 19 of its resolution 62/228.

4. Provision of legal advice and representation for employees in other international organizations

69. Many of the intergovernmental organizations that do not have their own Panel of Counsel offices seek assistance from the existing Panel. In the past, the Panel of Counsel determined whether to assist a staff member based on whether that staff member had access to the same recourse bodies as United Nations staff members, including but not limited to the Pension Fund, the Advisory Board on Compensation Claims, the Joint Appeals Board, the Joint Disciplinary Committee or Disciplinary Committee, and the United Nations Administrative Tribunal. Organizations that have processes in place to provide representation to their staff members may also request assistance from the Panel of Counsel. However, some organizations that have rules mandating such bodies have not, in fact, established them (for example, the International Seabed Authority).

70. Some organizations, such as the World Food Programme (WFP), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), the International Maritime Organization (IMO), the United Nations Industrial Development Organization (UNIDO) and the International Telecommunication Union (ITU), do not provide legal assistance per se but allow staff members to designate another staff member or former staff member to act as their counsel, a process very similar to that established by the United Nations in 1956. Staff of WFP, UNESCO, UNRWA and IMO have sought assistance directly from the New York office of the Panel of Counsel. In addition, staff of UNIDO, the International Atomic Energy Agency and the Comprehensive Nuclear-Test-Ban Treaty Organization sought assistance from the Vienna office of the Panel of Counsel. Some organizations, such as WFP, ITU and the Pan American Health Organization (PAHO), also provide for staff associations to facilitate the retention of legal services. Others, including the Food and Agriculture Organization of the

United Nations (FAO), provide for an in-house Panel of Counsel composed primarily of volunteers.

C. Jurisdiction and powers of the Dispute Tribunal and the Administrative Tribunal

71. The Sixth Committee requested further information on six specific points:

- The types of claims former staff members are eligible to bring before the United Nations Administrative Tribunal.
- Whether the Secretariat and the Administrative Tribunal interpret the phrase "terms of appointment" to extend beyond the written terms of the relevant employment contract, staff regulations and staff rules and, if so, on what legal basis.
- The conditions of employment or the duties of the Organization to its staff.
- With regard to the proposal to allow the Dispute and Appeals Tribunals to refer cases to the Secretary-General and heads of funds and programmes for action to enforce accountability, how the role of the Secretary-General would be different in this regard from that of the formal system and what mechanisms would prevent duplication of efforts.
- With respect to the Secretary-General's proposal to empower the Dispute Tribunal to suspend action on a contested administrative decision, what criteria would apply.
- The composition and role of staff associations.

The Secretary-General's responses to these questions are outlined below.

1. The types of claims former staff members have been eligible to bring and have brought before the United Nations Administrative Tribunal

72. Article 2, paragraph 1, of the statute of the Administrative Tribunal provides:

> "The Tribunal shall be competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members. The words 'contracts' and 'terms of appointment' include all pertinent regulations and rules in force at the time of alleged non-observance, including the staff pension regulations."

73. In practice, former staff members bring the same type of claims as those filed by serving staff members (for example, cases of non-promotion, non-classification, non-renewal of contract, disproportionate disciplinary measures), as well as claims concerning their separation from service (both the method of separation, whether termination, abolition of post or dismissal, and the financial arrangements, including separation benefits and entitlements). Many staff members commence appeals during active service but have separated by the time their cases reach the Administrative Tribunal.

2. Whether the Secretariat and the United Nations Administrative Tribunal interpret the phrase "terms of appointment" in article 2, paragraph 1, of the statute to extend beyond the written terms of the relevant employment contract, staff regulations and staff rules and, if so, on what legal basis

74. With regard to the interpretation of the expression "terms of appointment", it should be noted at the outset that the expressions "conditions of employment" and "terms of employment" are often used interchangeably with the expression "conditions of service",[7] as well as the expressions "terms of appointment" and "contracts of employment", which are used in article 2 of the statute of the Administrative Tribunal (see para. 72 above). For the purposes of this discussion, an explanation of the expression "terms of appointment", which is considered to be synonymous with these other expressions, is provided below.

75. A staff member's terms of appointment are set out in a letter of appointment which is received and signed upon appointment, pursuant to regulation 4.1.[8] Rule 104.1 provides that:

> "[a] letter of appointment granted to every staff member contains expressly or by reference all the *terms and conditions of employment*. All contractual entitlements of staff members are strictly limited to those contained expressly or by reference in their letters of appointment." [Emphasis added]

76. A letter of appointment shall address, inter alia, the nature and period of the appointment, the notice required to terminate it, the category and level of the appointment, the commencing rate of salary and any special conditions which may be applicable (see annex II to the Staff Regulations, subparas. (a) (i) to (vi)).

77. Moreover, the Administrative Tribunal has considered the legal sources of staff members' terms and conditions of service to be (a) written law; (b) the surrounding facts and circumstances in the context of the staff member's employment; (c) standard practice; and (d) other relevant principles.

(a) Written law

78. Each letter of appointment provides that it is elaborated "subject to the provisions of the Staff Regulations and Rules together with such amendments as may from time to time be made". These amendments are primarily contained in administrative issuances promulgated by the Secretariat and by separately administered United Nations funds and programmes which the Tribunal considers to "have the same force and effect as the Staff Rules unless inconsistent with the Staff Regulations". (Judgement No. 237, *Powell* (1979), cited in Judgement No. 337, *Cordovez* (1984), para. IV; and Judgement No. 1183, *Adrian* (2004), para. V.)

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[7] The expression "conditions of service" is used in Article 101 (3) of the Charter of the United Nations, regulation 1.1 (d) and the provision on "Scope and purpose" of the Staff Regulations.

[8] Regulation 4.1 provides, inter alia, that upon appointment, "each staff member ... shall receive a letter of appointment in accordance with the provisions of annex II to the present Regulations and signed by the Secretary-General".

(b) Surrounding facts and circumstances

79. The Administrative Tribunal considers that the context of a staff member's employment may adduce additional terms and conditions of employment:

> "The Tribunal has previously held that the terms and conditions of employment are not necessarily limited to those set out in writing. Rather, the Tribunal has made clear that 'the terms and conditions of employment of a staff member with the United Nations may be expressed or implied and may be gathered from correspondence and surrounding facts and circumstances'". (Judgement No. 376, *Shatby* (1986), quoting from Judgements No. 142, *Bhattacharyya* (1971), and No. 95, *Sikand* (1965).)

80. Such context may expand the legal rights of staff members by inducing "expectancies" not premised upon the Staff Regulations and Rules. For example, while fixed-term appointments do not carry any right of extension or renewal of contract, the Tribunal has held that the specific circumstances of a case may create a legal "expectancy" of renewal, producing rights for the staff member in question. Such circumstances might include a written commitment to extend the staff member's appointment:

> "The Tribunal has consistently upheld these rules, reaffirming that staff members serving under fixed-term appointments have no right to renewal of their contract and that their employment with the Organization ceases automatically and without prior notice upon the expiration date of their fixed-term contract, unless there are countervailing circumstances. (See Judgements No. 1048, *Dzuverovic* (2002); No. 1057, *Da Silva* (2002); and No. 1084, *Sabbatini* (2002).) These may include abuse of discretion or an express promise by the Administration, thereby creating an expectancy that the appointment will be extended." (See Judgement No. 1170, *Lejeune* (2004); see also Judgement No. 885, *Handelsman* (1998).)

81. It is important to note that the Administrative Tribunal has considered the context of employment to invoke obligations as well as rights for staff members. Thus, for example, the Administrative Tribunal has held that the terms and conditions of a security officer's employment required the officer to "be willing and able to bear firearms when required" not only because it was set forth in the Handbook of the Security and Safety Service but also because, "notwithstanding the written terms and conditions of her employment, requiring her to carry a weapon when called upon to do so, ... the Applicant knew or should have known, based on the very nature of her position as a Security Officer, that carrying a firearm, when required, was a condition of her employment". (Judgement No. 1231, *Brooks-Campbell* (2005).)

(c) Standard practice

82. In a number of Administrative Tribunal cases, reference is made to "standard practice". The term is typically used to describe a policy or measures affecting certain categories of staff at a particular duty station or, alternatively, all staff across the board. An example of the former is payment of salary to local staff members in the currency of the duty station.

83. The Administrative Tribunal is also informed by the standard practice of other jurisdictions and legal systems in the development of its jurisprudence. For

example, while the Tribunal is aware that in many legal systems it is standard practice to grant costs to successful litigants and impose costs against unsuccessful litigants, the Tribunal has chosen to deviate from this practice. The Administrative Tribunal will order costs only in exceptional circumstances: if they are demonstrated to have been unavoidable, reasonable in amount, and exceed normal expenses of litigation.

84. In Judgement No. 972, *Abdulhadi* (2000), where the respondent held that "the Applicant's compensation was properly paid in Syrian pounds, the currency of her duty station, in accordance with standard practice", the Tribunal considered that:

> "As to the concept of the value of the salary at the time of separation, ... in deciding on the alternative to reinstatement, its intention was to restore the Applicant's career in financial terms. It follows that the operative part of the judgement relating to the value of the salary at the time of separation cannot be interpreted in a manner likely to cause financial loss to the Applicant, since this would be a contradiction in terms.
>
> "Taking into account the continuous devaluation of the Syrian currency, the Tribunal interprets the concept of the value of the salary at the time of separation as requiring that the compensation should be calculated in a standard currency whose par value varies little: the United States dollar." (Para. III.)

85. In Judgement No. 1041, *Conde Estua* (2001), the Tribunal stated that:

> "in view of the particular complexities of the case ... it seems appropriate to make an exception to its general practice of not granting reimbursement of legal and procedural costs, especially to the losing party. This policy, set forth in document A/CN.5/R.2 of 18 December 1950, was based on the simplicity of proceedings before the Tribunal, but it also provided for exceptions to the general rule. The Tribunal believes that this case is one of the exceptional cases, and therefore awards costs to the losing party, as it has already done in earlier cases (see Judgements No. 237, *Powell* (1979), and No. 665, *Gonzales de German et al.* (1994))." (Para. XIII.)

(d) Other relevant principles

86. Finally, the Administrative Tribunal has invoked other relevant principles, including general principles of law, in deciding cases. Five examples of such principles are discussed below:

(i) Duty of care

87. The Administrative Tribunal has opined that, while the Secretary-General has the authority to assign staff members to "any of the activities or offices of the United Nations", he must, simultaneously, exercise a duty of care vis-à-vis those staff members to seek to ensure their safety. This duty of care on the part of the Organization has now been incorporated into the Staff Regulations and Rules, thus ensuring such protection to all staff members as a term of their employment. Regulation 1.2 provides:

> "Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United

Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them."

88. The Tribunal has found in a number of judgements that the respondent failed to fulfil his obligations in this regard. In Judgement No. 1204, *Durand* (2004), the Tribunal stated:

> "The Tribunal has previously held that the Organization has a legal obligation to protect its staff members and not put them in dangerous situations, if these can be avoided. (See Judgement No. 1125, *Mwangi* (2003).) In *Mwangi*, the Tribunal emphasized the importance it attaches to the duty of safe care by the Respondent, stating:
>
> > '[E]ven were such obligation not expressly spelled out in the Regulations and Rules, general principles of law would impose such an obligation, as would normally be expected of every employer. The United Nations, as an exemplary employer, should be held to higher standards and the Respondent is therefore expected to treat staff members with the respect they deserve, including the respect for their well-being ...'". (Para. XIV.)

(ii) General principles of law and foreign law

89. "The jurisprudence of the Tribunal is clear that the internal laws of the United Nations prevail and are the relevant legal basis upon which the Tribunal operates." (Judgement No. 1328 (2007); see also, e.g., Judgements No. 932, *Al Arid* (1999) and No. 1256 (2005).) In addition, the Tribunal has also ruled that "general principles of law" and "foreign law" may be of relevance to cases before it. In Judgement No. 1320 (2007), the Administrative Tribunal held that:

> "[w]here, however, there is a gap, or *lacuna*, in the internal laws, as in this case ... the Tribunal is entitled, if not obliged, to consider general principles of law. (See generally, Article 38 of the Statute of the International Court of Justice.) As such, it may take cognizance of foreign law, and grant it evidentiary value."

90. The Tribunal has also made reference to "all administrative law systems" in determining that an administrative decision may be written or unwritten, express or implied. (See Judgement No. 1157, *Andronov* (2003).)

(iii) Good faith

91. Of equal relevance is the Administrative Tribunal's consistent expectation that the Organization act with good faith in its relations with staff members:

> "The Respondent's exercise of his discretionary power ... must not be tainted by forms of abuse of power such as violation of the principle of good faith in dealing with staff, prejudice or arbitrariness or other extraneous factors that may flaw his decision." (See Judgement No. 885, *Handelsman* (1998).)

The principle of good faith is often invoked in cases of abolition of post, in that the respondent has an obligation to make good faith efforts to find a staff member whose post is abolished a suitable, alternative post. In Judgement No. 679, *Fagan* (1994), the Tribunal held, in paragraph XIII, that:

"staff rule 109.1 (c) requires that such efforts [to find alternative employment] be conducted in good faith with a view to avoiding, to the greatest extent possible, a situation in which a staff member who has made a career within the Organization for a substantial period of his or her professional life is dismissed and forced to undergo belated and uncertain professional relocation". (See also Judgement No. 943, *Yung* (1999).)

(iv) Exemplary employer

92. The Administrative Tribunal recognizes that the United Nations, "as an exemplary employer, should be held to higher standards and the Respondent is therefore expected to treat staff members with the respect they deserve". (See Judgement No. 1125, *Mwangi* (2003).) The Administrative Tribunal has held that "[t]he Organization has to respect and follow its procedures in keeping with what the world expects of the United Nations." (See Judgement No. 1022, *Araim* (2001).)

(v) Acquired rights and non-retroactive application of new statutory provisions

93. Finally, there is established jurisprudence of the Administrative Tribunal concerning the doctrine of acquired rights and non-retroactive application of new statutory provisions. It demonstrates that acquired rights are rights that derive from staff members' contract of employment and are acquired through service. (See, for example, Judgements No. 19, *Kaplan* (1953), para. 3; No. 202, *Quéguiner* (1975), para. VI; No. 370, *Molinier et al.* (1986), para. XLIII.)

94. Acquired rights cannot be impaired with retroactive effect. For example, in Judgement No. 82, *Puvrez* (1961), the Tribunal held that "no amendment [to the Staff Regulations and Rules] may have an adverse retroactive effect in relation to a staff member". (Para. VII.) In Judgement No. 266, *Capio* (1980), the Tribunal stipulated that "respect for acquired rights means that the complex of benefits and advantages to which a staff member is entitled for services rendered before the entry into force of a new rule cannot be impaired". The Tribunal ruled that the Applicant should be considered for promotion to a Professional post on the basis that she had an acquired right to be promoted. The doctrine of "acquired rights" also led the Tribunal to rule, in Judgement No. 273, *Mortished* (1981), that staff members have an acquired right to a repatriation grant without having to provide evidence of relocation. In Judgement No. 685, *Horlacher* (1994), the Tribunal held that "an amendment of the applicable Staff Regulations and Staff Rules which abolished the right to reimbursement [of income taxes on lump sum withdrawal of pension benefits] would be permissible with regard to pension benefits resulting from service after such an amendment, but could not be applied retroactively with respect to pension benefits resulting from service prior to the amendment". (Para. VII.) In addition, in Judgement No. 1333, *Varchaver* (2007), the Tribunal held that:

"... the Administration's repeated attempts to impose the prohibition of ST/AI/394 upon the Applicant, even though the administrative instruction did not exist at the time the Applicant decided to withdraw from dental coverage, also violates the long-standing principle of law regarding non-retroactivity. In Judgement No. 1197, *Meron* (2004), citing Judgement No. 82, *Puvrez* (1961), the Tribunal held that '[n]o amendment of the regulations may affect the benefits and advantages accruing to the staff member for services rendered

before the entry into force of the amendment. Hence, no amendment may have an adverse retroactive effect in relation to a staff member'." (Para. XI.)

3. The conditions of employment or the duties of the Organization to its staff

(a) Conditions of employment

95. A clarification of "conditions of employment" is provided in paragraphs 74 to 77 above.

(b) Duties of the Organization to its staff

96. The expression "duties of the Organization to its staff" appears in paragraph 78 of the report of the Redesign Panel (A/61/205), in which the Panel recommended that the formal justice system "allow for complaints with respect to conduct that is inconsistent with the duties of the Organization to its staff or that infringes their individual rights". The expression "duties of the Organization to its staff", as it is used in paragraph 78 of the Panel's report, appears to be referring to the duties of the Secretary-General to his or her staff.

97. The duties of the Secretary-General to staff are set out in various provisions of the Staff Regulations and Rules, and are further explained in the commentaries on these provisions. For example, the commentary on regulation 1.1 (c) contained in Secretary-General's bulletin ST/SGB/2002/13 provides that this provision "codifies an implicit duty that falls on the Secretary-General, that is, to ensure that the rights and duties of staff members are respected". Similarly, the commentary on regulation 1.2 (c) provides that the "Secretary-General, as chief administrative officer, has an inherent responsibility to seek to ensure the safety of staff. This regulation recognized that responsibility as a basic right of staff." (See also paras. 87 and 88 above.)

4. The proposal to empower the United Nations Dispute Tribunal and the United Nations Appeals Tribunal to refer appropriate cases to the Secretary-General and the heads of funds and programmes for "possible action to enforce accountability" and, in particular, how the role of the Secretary-General in this regard will be different from that of the formal system of justice and what mechanisms will prevent duplication of efforts

98. The Redesign Panel recommended that the Dispute Tribunal judges have the power to refer appropriate cases to the Secretary-General for possible action to enforce accountability (see A/61/205, para. 159). The Secretary-General agreed that the Dispute Tribunal and the Appeals Tribunal should be empowered to make such referrals (see A/61/758, para. 29). The Secretary-General's proposal is reflected in the draft statute of the Dispute Tribunal, article 10(7) (see annex I), and in article 9(6) of the draft statute of the Appeals Tribunal (see annex II).

99. The intention of these provisions is that the Dispute Tribunal and the Appeals Tribunal may suggest to the Secretary-General and executive heads of separately administered funds and programmes to review cases to determine whether to initiate proceedings to enforce accountability, e.g., disciplinary proceedings which may lead to the imposition of a disciplinary measure or proceedings for recovery of financial loss arising from gross negligence, where warranted. At present, the procedures in the Secretariat on ensuring financial accountability for gross negligence are set out

in administrative instruction ST/AI/2004/3, of 29 September 2004, on the financial responsibility of staff members for gross negligence. These procedures, which provide for advice from the Joint Disciplinary Committee at Headquarters in cases where gross negligence on the part of staff members results in financial loss by the Organization, will need to be revised in view of the abolition of the Joint Disciplinary Committee as a result of the introduction of the new administration of justice system.

100. The referral of cases by the Dispute Tribunal or the Appeals Tribunal would be without prejudice to whether proceedings are eventually initiated, as well as to the outcome of any such proceedings. Such matters fall exclusively within the authority of the Secretary-General and the executive heads of the funds and programmes.

101. In addition, the authority of the Dispute Tribunal and the Appeals Tribunal described above should be distinguished from the Redesign Panel's proposal that the formal system of justice should entertain applications for the enforcement of individual financial accountability (see A/61/205, para. 159). With respect to that proposal, the Secretary-General stated that it would not be necessary to seek the Dispute Tribunal's approval prior to such action being taken (see A/61/758, para. 27). The Secretary-General expressed the view that he or the executive heads of separately administered funds and programmes should continue to take appropriate administrative or disciplinary action to enforce accountability, including the application of rules on financial responsibility when the conditions are met, without having to obtain the Dispute Tribunal's approval to do so.

5. The Secretary-General's proposal to empower the United Nations Dispute Tribunal, upon request by the staff member concerned, to suspend action on implementation of a contested administrative decision, specifically, the criteria the Tribunal would apply in suspending such action

Criteria for suspending action on a contested administrative decision

102. In any case where the contested decision carries an effective date and the applicant has received actual notice 10 or more working days in advance of that date, the applicant must file a request to suspend action to implement the contested decision (if he or she wishes to do so) at least 10 working days prior to the effective date, absent exceptional circumstances.

103. Under current Joint Appeals Board practice, a request for suspension of action is granted where (a) the contested decision has not yet been implemented; and (b) the staff member presents prima facie evidence that a violation of his or her rights as a staff member has occurred, and the implementation of the decision will cause irreparable damage or injury to his or her staff rights if the request is not granted. Unless otherwise defined by administrative directives, the implementation of an administrative decision occurs when the decision is rendered effective following the execution of concrete measures under normal procedures. "Irreparable damage or injury" is interpreted as harm which may not be adequately remedied by an award of monetary damages.

104. In reviewing requests for suspension of action under the new administration of justice system, the Dispute Tribunal and the Secretary-General, in the context of the management evaluation, may be guided by the current practice of the Joint Appeals Board.

6. Composition and role of staff associations

105. Regulation 8.1 sets out the principle that staff should be able to participate in "identifying ... and resolving issues relating to staff welfare, including conditions of work, general conditions of life and other personnel policies". Accordingly, staff associations have been established at Headquarters and other duty stations. Rule 108.2 provides for the machinery for consultation between staff and management, both at the local level and Secretariat-wide. This is also the mechanism through which nominations for representatives of the staff for joint bodies, such as the central review bodies or the Joint Appeals Board, are sought. Staff associations have no standing in their own right in such bodies. In the development of the new internal justice system, staff consultations have been carried out through the Staff-Management Coordination Committee.

III. Draft statutes of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal

106. The draft statutes of the Dispute Tribunal and the Appeals Tribunal are attached in annexes I and II, respectively, to the present report, for consideration by the General Assembly. Salient issues for consideration by the General Assembly are set out below.

A. Draft statute of the Dispute Tribunal

107. With respect to article 2(1)(a) of the draft statute of the Dispute Tribunal, the term "administrative decision" includes both implied decisions and administrative decisions to take no action on a complaint, including a decision to take no action on a complaint of prejudicial or injurious conduct that did not conform to the Staff Regulations and Rules, where the management evaluation of the complaint led to the conclusion that the complaint was not detailed or specific enough to justify an investigation or was not corroborated.

108. The General Assembly will be required to take further action with respect to article 3(1)(d) of the draft statute, which provides, inter alia, that the Dispute Tribunal shall be open to any person performing work by way of his or her own personal service for the United Nations Secretariat or separately administered United Nations funds and programmes, with the exceptions of those individuals referred to in article 3(1)(d)(i) to (v). Other categories of individuals who would not be permitted to file applications to the Dispute Tribunal on the basis of this provision include officials other than Secretariat officials (for example, Joint Inspection Unit inspectors, the Chairman of the Advisory Committee on Administrative and Budgetary Questions and the Chairman and Vice-Chairman of the International Civil Service Commission) and experts on mission who are not engaged as consultants, individual contractors or service contractors. The General Assembly will need to address the issue concerning the access of such individuals to the Tribunal.

109. The General Assembly requested that further consideration be given to the question of whether a decision by the Dispute Tribunal should be decided by a single judge or a panel of three judges (see A/C.5/62/11, para. 20). The General

Assembly also requested the Secretary-General to present further proposals in this regard, including resource implications, to the General Assembly at the second part of its resumed sixty-second session (see resolution 62/228, para. 43).

110. At present, article 10 of the draft statute provides that while judgements by the Dispute Tribunal shall normally be rendered by a single judge, it may refer any case to a panel of three judges for a decision. The Secretary-General considers that it would be inappropriate to prescribe in a statute the specific categories of cases which should be considered by a panel of three judges, as this matter should be left to the discretion of the Dispute Tribunal. However, the Secretary-General is of the view that having a panel of three judges representing diverse legal traditions and practices, as well as cultural and linguistic backgrounds, would be particularly important in cases involving (a) a contested administrative decision related to appointment, promotion or termination; (b) an allegation of harassment or discriminatory treatment supported by substantiated evidence; or (c) a situation where the potential exists for substantial financial damages for the Organization, such as when a single judge reviewing a case considers that the compensation to be ordered by the Dispute Tribunal is expected to be in excess of two years' net base salary. In view of practical and logistical difficulties that are likely to arise in assembling a panel of three judges to consider the above-identified cases (e.g., the three full-time and two half-time judges would be in different locations), the General Assembly may wish to consider revisiting the issue of the total number of judges in the Dispute Tribunal.

111. With respect to article 8(1)(c) of the draft statute, a management evaluation will not be required for administrative decisions made at Headquarters to impose disciplinary sanctions and administrative decisions when taken pursuant to advice given by technical boards, such as the Advisory Board on Compensation Claims (see A/62/294, paras. 81 and 82).

112. Another issue requiring the General Assembly's attention concerns the execution of Dispute Tribunal judgements awarding compensation to the applicants when an appeal against the judgement is filed by either party. At issue is whether the awarded compensation should be paid pending completion of the appeal. Several options are available to address this issue:

(a) Any compensation would be paid immediately and would then be recovered from the applicant should the Appeals Tribunal reverse the Dispute Tribunal's judgement;

(b) The payment of compensation would be stayed pending judgement by the Appeals Tribunal. If the Dispute Tribunal's judgement is affirmed, compensation would be paid, plus interest; or

(c) The awarded compensation would be placed in an escrow account pending the completion of the appeals process. If the Appeals Tribunal affirms the Dispute Tribunal's judgement, the compensation awarded by the Dispute Tribunal would be paid, in addition to the interest that has accrued in the intervening period.

113. Because public money is at issue in the payment of any compensation, where the judgement has been decided in favour of the applicant, potential adverse consequences to the Organization must be considered if, as under option (a) in paragraph 112 above, compensation were to be paid immediately prior to a final determination on an appeal. Recovering the compensation paid could be difficult,

particularly in a case where the staff member has subsequently separated from service.[9] Accordingly, the Secretary-General believes that the best practice would be that compensation awarded by the Dispute Tribunal be placed in an escrow account pending any appeal and that, should the Appeals Tribunal affirm the judgement, the compensation be paid, plus the accrued interest. However, the Secretary-General considers that the Dispute Tribunal should also have the discretion to order the immediate payment of compensation, notwithstanding the filing of an appeal, where the applicant has established to the satisfaction of the Dispute Tribunal that undue hardship would be occasioned by any delay in the payment. Article 7(4) of the draft statute of the Appeals Tribunal may need to be adjusted, depending on the General Assembly's decision on this matter.

B. Draft statute of the Appeals Tribunal

114. The draft statute of the Appeals Tribunal provides that the Tribunal would conduct appellate reviews of the decisions of the Dispute Tribunal, as well as first instance reviews of decisions of the Pension Fund and the other organizations which have accepted the jurisdiction of the current Administrative Tribunal. Subject to the General Assembly's decision, articles 2(3) and (4) of the draft statute of the Appeals Tribunal reflect the Secretary-General's proposal that decisions taken by the Pension Fund and other organizations which currently may be challenged in the Administrative Tribunal would come under the jurisdiction of the new Appeals Tribunal, which would continue to act as an administrative tribunal for the Pension Fund and those organizations (see A/62/294, para. 152).

115. The General Assembly requested the Secretary-General to consult with the organizations which currently participate in the United Nations Administrative Tribunal with the aim of providing for an orderly transition to another system of their choosing, if they were not to join the new system of administration of justice (see resolution 62/228, para. 60). The Secretary-General has undertaken a review of those agreements and is engaged in ongoing consultations with those organizations.

116. Under the current system, a staff member may challenge a decision of the Pension Fund Board before the Administrative Tribunal.[10] Any decision by the General Assembly to change the existing arrangements would require the revision of the Regulations of the United Nations Joint Staff Pension Fund, which are adopted by the General Assembly.

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[9] In cases where an applicant refuses to return compensation already paid voluntarily, the Organization may, in such situations, consider instituting a civil action in local court against the individuals concerned, seeking recovery of the compensation already paid. However, the Organization would, in most instances, choose not to resort to such action since the privileges and immunities of the Organization would have to be waived in order to commence and continue such action. In addition, commencement of such action would not guarantee that the local court would render a decision in the Organization's favour. Another important issue to bear in mind is that the institution of a civil action in such a context would be likely to result in conflicting legal interpretation of internal United Nations rules by outside judicial organs, which would have negative attendant consequences.

[10] See Regulations of the United Nations Joint Staff Pension Fund, article 48. This right is also set out in article 14(2) of the statute of the Administrative Tribunal.

C. Transitional measures for the Dispute Tribunal and the Appeals Tribunal

117. The General Assembly decided to revert to the issue of transitional arrangements at the second part of its resumed sixty-second session (see resolution 62/228, para. 59). The Secretary-General's proposals concerning the transitional measures are set out in his report (A/62/294, paras. 147-152). In the interest of clarity, the Secretary-General sets out below a summary of those proposals.

118. The Joint Appeals Board will continue to review pending cases until 30 November 2008. If a Joint Appeals Board has not completed its report by 30 November 2008, the entire case will be transferred to the Dispute Tribunal on 1 January 2009.

119. The Joint Appeals Board will continue to review requests for suspension of action until 31 December 2008. If a Joint Appeals Board has not issued its report on a request for suspension of action before 31 December 2008, the request will be transferred to the Dispute Tribunal on 1 January 2009, which will review and decide on the request.

120. The Joint Disciplinary Committee or the Disciplinary Committee, as applicable, will review pending requests for review of summary dismissal decisions until 30 November 2008. If the Joint Disciplinary Committee or the Disciplinary Committee has not issued its report on a summary dismissal case by 30 November 2008, the entire case will be transferred to the Dispute Tribunal on 1 January 2009.

121. In respect of other disciplinary cases, the Joint Disciplinary Committee or the Disciplinary Committee, as applicable, will continue to review pending cases until 31 December 2008. If the Joint Disciplinary Committee or the Disciplinary Committee, as applicable, does not complete its report on such a case by 31 December 2008, the Secretary-General or, in the case of a separately administered fund or programme having delegated authority, the executive head, will make a decision on the case without advice from the Joint Disciplinary Committee or the Disciplinary Committee, as applicable. The staff member concerned may appeal the decision to the Dispute Tribunal.

122. The proposals above are reflected in articles 2(5) and 8(6) of the draft statute of the Dispute Tribunal. A decision by the General Assembly on the transitional measures is required, so that appropriate arrangements may be made promptly, including the issuance of administrative issuances to staff informing them of those arrangements.

123. The rationale for the above proposals is that in cases where the Secretary-General took a decision, i.e., a summary dismissal decision, or a decision for which suspension of action is requested or which is being appealed, the Secretary-General cannot take a decision again, and, therefore, the case must be referred to the Dispute Tribunal for resolution. In all other disciplinary cases where the Secretary-General sought the advice of the Joint Disciplinary Committee or the Disciplinary Committee, as applicable, on the imposition of a disciplinary measure, the Secretary-General is competent to take a decision without advice from the Joint Disciplinary Committee or the Disciplinary Committee, as applicable.

124. The proposals described above are premised on the fact that the Dispute Tribunal will be established and be functional by 1 January 2009. In order to ensure

that this will be the case, the Secretary-General considers that the statute of the Dispute Tribunal, as well as the statute of the Appeals Tribunal, must be approved by the General Assembly at its earliest opportunity, i.e., at the second part of its resumed sixty-second session, to ensure that judges of the Dispute Tribunal could be elected and appointed sufficiently in advance of 1 January 2009.

125. With regard to the draft statute of the Appeals Tribunal, the Secretary-General proposed that the Tribunal, in its capacity as an administrative tribunal, will consider:

(a) Applications in respect of decisions made before 31 December 2008 by the Secretary-General or executive head on a report of a Joint Appeals Board, Joint Disciplinary Committee or Disciplinary Committee;

(b) Pending applications filed with the current United Nations Administrative Tribunal before 1 January 2009;

(c) Applications in respect of decisions made by the United Nations Joint Staff Pension Board, or by the executive heads of the organizations that are not subject to the jurisdiction of the Dispute Tribunal (see A/62/294, para. 152).

126. Having further considered the scope of the transition required, and benefiting from additional experience and information now available, the Secretary-General no longer considers this to be the most efficient and practical solution.

127. Despite the best efforts, it is inevitable that there will be a considerable backlog of cases filed before the Administrative Tribunal that will not have been disposed of by 31 December 2008. Not only is there a very large number of cases already pending, but cases will continue to be filed in the course of 2008, especially as the Joint Appeals Boards, Joint Disciplinary Committees and Disciplinary Committees are also expected to continue operations until the end of the year. Based on historical averages, and taking into account expected new cases in the course of 2008, it is projected that there will be more than 130 cases pending before the Administrative Tribunal at the end of 2008.

128. The Appeals Tribunal is unlikely to be in any position to consider cases until the middle of 2009, as its first session would be devoted to deciding on rules of procedure and other organizational matters. If at that point the Appeals Tribunal were to be overburdened with a caseload far in excess of 100 cases emanating from the old system, to be handled in accordance with the current Administrative Tribunal statute, it would in effect delay the introduction of the new system of administration of justice. This would clearly be undesirable.

129. The Secretary-General proposes instead that all applications filed with the current Administrative Tribunal that are pending as at 31 December 2008 be transferred to the Dispute Tribunal as at 1 January 2009. To make this a feasible option, the Secretary-General proposes, as a transitional measure, that the Dispute Tribunal be strengthened by three ad litem judges and support staff for 2009 in order to clear the backlog. As the Dispute Tribunal judges work full time, rather than in two yearly sessions as is the case for the Appeals Tribunal, it would have a greater capacity to handle an expanded caseload. Another advantage is that the caseload could be divided among the three Dispute Tribunal locations. This proposal would enable the new Appeals Tribunal to start with a clean slate, focusing on its proper role as an appeals instance.

130. The General Assembly's approval is therefore requested for three temporary positions, at the D-2 level, for ad litem judges, to enhance the capacity of the Dispute Tribunal for one year. As with the other judge positions, candidates would be screened by the Internal Justice Council. In addition, general temporary assistance would be required corresponding to two legal officers (P-2) and two General Service staff members for the duration of one year.

131. The Secretary-General seeks the General Assembly's decision on transitional measures, so that appropriate language could be included in the final texts of the statutes of the Dispute Tribunal and the Appeals Tribunal.

Annex I

Draft statute of the United Nations Dispute Tribunal

Article 1

A tribunal is established by the present statute to be known as the United Nations Dispute Tribunal.

Article 2

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided in article 3(1) of the present statute, against the United Nations, including separately administered United Nations funds and programmes:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the conditions of employment; or

(b) To appeal an administrative decision imposing a disciplinary measure.

2. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by a staff member requesting a suspension of action in respect of a contested administrative decision that is the subject of an ongoing management evaluation. The Dispute Tribunal's decision on such an application shall not be subject to appeal.

3. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by a staff association, as provided in article 3(3) of the present statute, against the United Nations or separately administered United Nations funds and programmes:

(a) To enforce the rights of staff associations, as recognized under the Staff Regulations and Rules;

(b) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the conditions of employment, on behalf of a group of named staff members who are entitled to file such application under article 2(1) of the present statute and who are affected by the same administrative decision arising out of the same facts; or

(c) To support an application filed by one or more staff members who are entitled to appeal the same administrative decision under article 2(1)(a) of the present statute, by means of the submission of a friend-of-the-court brief or by intervention.

4. In the event of a dispute as to whether the Dispute Tribunal has competence under the present statute, the Tribunal shall decide on the matter.

5. As a transitional measure, the Dispute Tribunal shall have jurisdiction over: (a) a case transferred to it on 1 January 2009 from a joint appeals board or a joint disciplinary committee established by the United Nations or from another similar body established by a separately administered fund or programme, and (b) an application filed with the United Nations Administrative Tribunal before 1 January 2009, that has not been reviewed by the Administrative Tribunal as of 31 December

2008. The Dispute Tribunal's decision on an application under (b) above shall not be subject to appeal.

Article 3

1. An application under article 2(1) of the present statute may be filed by:

(a) Any staff member of the United Nations, including of the United Nations Secretariat or separately administered United Nations funds and programmes;

(b) Any former staff member of the United Nations, including of the United Nations Secretariat or separately administered United Nations funds and programmes;

(c) Any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including of the United Nations Secretariat or separately administered United Nations funds and programmes;

(d) Any person performing work by way of his or her own personal service for the United Nations Secretariat or separately administered United Nations funds and programmes, no matter the type of contract by which he or she is engaged, with the exception of persons in the following categories:

(i) Military or police personnel in peacekeeping operations;

(ii) Volunteers (other than United Nations Volunteers);

(iii) Interns;

(iv) Type II gratis personnel (personnel provided to the United Nations by a Government or other entity responsible for the remuneration of the services of such personnel and who do not serve under any other established regime); or

(v) Persons performing work in conjunction with the supply of goods or services extending beyond their own personal service or pursuant to a contract entered into with a supplier, contractor or consulting firm.

2. A request for a suspension of action under article 2(2) of the present statute may be filed by a staff member of the United Nations, including of the United Nations Secretariat or separately administered United Nations funds and programmes.

3. An application under article 2(3) of the present statute may be filed by a staff association recognized under United Nations staff regulation 8.1 (b).

Article 4

1. The Dispute Tribunal shall be composed of three full-time judges and two half-time judges.

2. The judges shall be appointed by the General Assembly from a list of candidates compiled by the Internal Justice Council established pursuant to General Assembly resolution 62/228. No two judges shall be of the same nationality. Due consideration shall be given to gender and regional balance.

3. To be eligible for appointment as a judge, a person shall:

(a) Be of high moral character; and

(b) Possess at least 10 years of judicial experience in the field of administrative law, or the equivalent within one or more national jurisdictions.

4. A judge of the Dispute Tribunal shall be appointed for one non-renewable term of seven years. As a transitional measure, two of the judges (one full-time judge and one half-time judge) initially appointed, to be determined by drawing of lots, shall serve three years and may be reappointed to the same Dispute Tribunal for a further non-renewable term of seven years.

5. A judge of the Dispute Tribunal appointed to replace a judge whose term of office has not expired shall hold office for the remainder of his or her predecessor's term, and may be reappointed for one non-renewable term of seven years.

6. A former judge of the Dispute Tribunal shall not be eligible for any subsequent appointment within the United Nations, except another judicial post.

7. The Dispute Tribunal shall elect a President.

8. A judge of the Dispute Tribunal shall serve in his or her personal capacity and enjoy full independence.

9. A judge of the Dispute Tribunal who has a conflict of interest in a case shall recuse himself or herself.

10. A judge of the Dispute Tribunal may only be removed by the General Assembly on grounds of proven misconduct or incapacity.

11. A judge of the Dispute Tribunal may resign, by notifying the General Assembly through the Secretary-General.

Article 5

The three full-time judges of the Dispute Tribunal shall normally perform their functions in New York, Geneva and Nairobi, respectively. The Dispute Tribunal may decide to hold sessions in other duty stations, as required by the caseload.

Article 6

1. The Secretary-General of the United Nations shall make the administrative arrangements necessary for the functioning of the Dispute Tribunal.

2. The Registries of the Dispute Tribunal shall be established in New York, Geneva and Nairobi, each consisting of a Registrar and such other staff, as necessary.

3. The expenses of the Dispute Tribunal shall be borne by the United Nations.

4. Compensation ordered by the Dispute Tribunal shall be paid by the United Nations Secretariat or separately administered United Nations funds and programmes, as applicable and appropriate, or by the specialized agency, organization or entity that has accepted the jurisdiction of the Dispute Tribunal.

Article 7

1. Subject to the provisions of the present statute, the Dispute Tribunal shall establish its own rules.

2. The rules shall include provisions concerning:

(a) Organization of work;

(b) Presentation of submissions and the procedure to be followed in respect thereto;

(c) Procedures for maintaining the confidentiality and inadmissibility of verbal or written statements made during the mediation process;

(d) Intervention by persons not party to the case whose rights may be affected by the judgement;

(e) Oral hearings;

(f) Publication of judgements; and

(g) Other matters relating to the functioning of the Dispute Tribunal.

Article 8

1. An application shall be receivable if:

(a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;

(b) An applicant is eligible to file an application, pursuant to article 3 of the present statute;

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required;

(d) Unless the Dispute Tribunal has suspended or waived the deadline, the application is filed within the following applicable deadline:

(i) In cases where a request for a management evaluation is required, the application must be filed:

a. Within 30 days of the applicant's receipt of the response to the management evaluation; or

b. Within 30 days from the expiry of the 45-day response period, if no response to the management evaluation was provided;

(ii) In cases where a request for a management evaluation is not required, the application must be filed within 30 days of the notification of the applicant's receipt of the administrative decision.

2. An application shall not be receivable if the dispute arising from contested administrative decision had been resolved by an agreement reached through mediation. However, an applicant may file an application to enforce the implementation of an agreement reached through mediation, which shall be receivable if the agreement has not been implemented in a timely manner or in accordance with the agreement.

3. The Dispute Tribunal may decide to suspend or waive the deadlines in any case.

4. The filing of an application shall not have the effect of suspending the execution of the contested administrative decision.

5. An application and other submissions shall be filed in any of the official languages of the United Nations.

6. As a transitional measure, a case transferred on 1 January 2009 pursuant to article 2 (5) of the present statute must also satisfy deadlines for transitional measures applicable to such cases to be provided separately by an administrative issuance.

Article 9

1. The Dispute Tribunal may order production of documents or such other evidence as it deems necessary.

2. The Dispute Tribunal shall decide whether the personal appearance of the applicant is required at oral proceedings and the appropriate means for satisfying the requirement of personal appearance.

3. The oral proceedings of the Dispute Tribunal shall be held in public unless the Dispute Tribunal decides, at its own initiative or at the request of either party, that circumstances require the proceedings to be closed.

Article 10

1. The Dispute Tribunal shall suspend proceedings in a case, at the request of both parties to the application.

2. At any time during its deliberations, the Dispute Tribunal may order the following measures, which are final and without appeal:

(a) An interim order to provide temporary relief to either party, including a suspension of action of the contested administrative decision; and

(b) Referral of a case for mediation.

3. Prior to a determination of the merits of a case, should the Dispute Tribunal find that a relevant procedure prescribed in the Staff Regulations and Rules or applicable administrative issuances has not been observed, the Dispute Tribunal may remand the case for institution or correction of the required procedure. In such cases, the Dispute Tribunal may order the payment of compensation for procedural delay, which is not to exceed the equivalent of three months' net base salary.

4. Where the Dispute Tribunal determines that an application is well founded, it may order one or more of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered;

(b) Compensation, which shall not normally exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, order the payment of a higher indemnity in exceptional cases and shall provide the reasons for that decision;

(c) Interest; or

(d) Costs.

5. Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before the Tribunal, it may award costs against that party.

6. The Dispute Tribunal may not award exemplary or punitive damages.

7. The Dispute Tribunal may refer appropriate cases to the Secretary-General or executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability.

8. Judgements by the Dispute Tribunal shall normally be rendered by a single judge. The Dispute Tribunal may decide to refer a case to a panel of three judges to render a judgement.

Article 11

1. The judgements of the Dispute Tribunal shall be issued in writing and shall state the reasons on which they are based.

2. The deliberations of the Dispute Tribunal shall be confidential.

3. The judgements of the Dispute Tribunal shall be binding upon the parties.

4. The judgements of the Dispute Tribunal shall be drawn up in any of the six official languages of the United Nations, in two originals, which shall be deposited in the archives of the United Nations.

5. A copy of the Dispute Tribunal's judgements shall be communicated to each party in the case.

6. The judgements of the Dispute Tribunal shall be published and made generally available by the Registry of the Tribunal.

Article 12

1. Either party may apply to the Dispute Tribunal for a revision of a judgement on the basis of the discovery of a decisive fact which was, at the time the judgement was issued, unknown to the Dispute Tribunal and to the party claiming revision, provided that such ignorance was not due to negligence. The application must be made within one year of the date of the judgement.

2. Clerical or arithmetical mistakes may at any time be corrected by the Dispute Tribunal either on its own motion or on the application of any of the parties.

3. Either party may apply to the Dispute Tribunal for interpretation or an order for execution of a judgement.

Article 13

The present statute may be amended by decision of the General Assembly.

Annex II

Draft statute of the United Nations Appeals Tribunal

Article 1

A Tribunal is established by the present statute to be known as the United Nations Appeals Tribunal.

Article 2

1. The Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal, in which it is asserted that the Dispute Tribunal has:

(a) Exceeded its jurisdiction or competence;

(b) Failed to exercise jurisdiction vested in it;

(c) Committed a fundamental error in procedure that has occasioned a failure of justice;

(d) Erred on a question of law; or

(e) Erred on a question of material fact.

2. An appeal may be filed by either party (i.e. the applicant or the respondent) to a judgement of the Dispute Tribunal, or by the successor of such party.

3. The Appeals Tribunal shall decide upon its own competence.

4. The Appeals Tribunal shall be competent to hear and pass judgement upon an application alleging non-observance of the regulations of the United Nations Joint Staff Pension Fund arising out of the decision of the United Nations Joint Staff Pension Board submitted by:

(a) Any staff member of a member organization of the Pension Fund which has accepted the jurisdiction of the Appeals Tribunal in Pension Fund cases who is eligible under article 21 of the regulations of the Fund as a participant in the Fund, even if his or her employment has ceased, and any person who has acceded to such staff member's rights upon his or her death;

(b) Any other person who can show that he or she is entitled to rights under the regulations of the Pension Fund by virtue of the participation in the Fund of a staff member of such member organization.

5. The Appeals Tribunal shall be competent to hear and pass judgement on an application filed against a specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter of the United Nations or other international organization or entity established by a treaty and participating in the common system of conditions of service, where a special agreement has been concluded between the agency, organization or entity concerned and the Secretary-General of the United Nations to establish the terms of the Appeals Tribunal's jurisdiction. Such special agreement shall provide that the agency, organization or entity concerned shall be bound by the judgements of the Appeals Tribunal and be responsible for the payment of any compensation awarded by the Appeals Tribunal in respect of its own staff members

and shall include, inter alia, provisions concerning its participation in the administrative arrangements for the functioning of the Appeals Tribunal and concerning its sharing of the expenses of the Appeals Tribunal.

Article 3

1. The Appeals Tribunal shall be composed of seven judges.

2. The judges of the Appeals Tribunal shall be appointed by the General Assembly from a list of candidates compiled by the Internal Justice Council established pursuant to General Assembly resolution 62/228. No two judges shall be of the same nationality. Due consideration shall be given to gender and regional balance.

3. To be eligible for appointment as a judge, a person shall:

(a) Be of high moral character; and

(b) Possess at least 15 years of judicial experience in the field of administrative law, or the equivalent within one or more national jurisdictions.

4. A judge of the Appeals Tribunal shall be appointed for one non-renewable term of seven years. As a transitional measure, three of the judges initially appointed, to be determined by drawing of lots, shall serve three years and may be reappointed to the same Appeals Tribunal for a further non-renewable term of seven years.

5. A judge of the Appeals Tribunal appointed to replace a judge whose term of office has not expired shall hold office for the remainder of his or her predecessor's term, and may be reappointed for one non-renewable term of seven years.

6. A judge of the Appeals Tribunal shall not be eligible for any appointment within the United Nations, except another judicial post.

7. The Appeals Tribunal shall elect a President and two Vice-Presidents.

8. A judge of the Appeals Tribunal shall serve in his or her personal capacity and enjoy full independence.

9. A judge of the Appeals Tribunal who has a conflict of interest in a case shall recuse himself or herself.

10. A judge of the Appeals Tribunal may only be removed by the General Assembly on grounds of proven misconduct or incapacity.

11. A judge of the Appeals Tribunal may resign, by notifying the General Assembly through the Secretary-General.

Article 4

1. The Appeals Tribunal shall hold ordinary sessions at dates to be fixed by its rules, subject to the determination of the President that there is a sufficient number of cases to justify holding the session.

2. Extraordinary sessions may be convoked by the President, as required by the caseload.

Article 5

1. The Secretary-General shall make the administrative arrangements necessary for the functioning of the Appeals Tribunal.

2. The Registry of the Appeals Tribunal shall be established in New York, consisting of a Registrar and such other staff, as necessary.

3. The expenses of the Appeals Tribunal shall be borne by the United Nations.

4. Compensation ordered by the Appeals Tribunal shall be paid by the United Nations Secretariat or separately administered United Nations funds and programmes as applicable and appropriate, or by the specialized agency, organization or entity that has accepted the jurisdiction of the Appeals Tribunal.

Article 6

1. Subject to the provisions of the present statute, the Appeals Tribunal shall establish its rules.

2. The rules shall include provisions concerning:

(a) Election of the President and Vice-Presidents;

(b) Composition of the Tribunal for its sessions;

(c) Organization of work;

(d) Presentation of submissions and the procedure to be followed in respect thereto;

(e) Procedures for maintaining the confidentiality and inadmissibility of verbal or written statements made during the mediation process;

(f) Intervention by persons not party to the case whose rights may be affected by the judgement;

(g) Oral hearings;

(h) Publication of judgements; and

(i) Other matters relating to the functioning of the Tribunal.

Article 7

1. An appeal shall be receivable if:

(a) The Appeals Tribunal is competent to hear and pass judgement on the appeal, pursuant to article 2(1) of the present statute;

(b) The appellant is eligible to file the appeal, pursuant to article 2(2) of the present statute; and

(c) The appeal is filed within forty-five days of receipt of the judgement of the Dispute Tribunal, or the Appeals Tribunal has suspended or waived the deadline.

2. For purposes of applications alleging non-observance of the regulations of the United Nations Joint Staff Pension Fund arising out of a decision of the United Nations Joint Staff Pension Board, an application shall be receivable if filed within ninety days from the receipt of the Board's decision.

3. The Appeals Tribunal may decide to suspend or waive the deadlines in any case.

4. The filing of appeals shall not have the effect of suspending the execution of the judgement contested.

5. An appeal and other submissions shall be filed in one of the official languages of the United Nations.

Article 8

1. The Appeals Tribunal may order production of documents or such other evidence as it deems necessary.

2. The Appeals Tribunal shall decide whether the personal appearance of the appellant is required at oral proceedings and the appropriate means for satisfying the requirement of personal appearance.

3. The judges assigned to a case will determine whether to hold oral hearings.

4. The oral proceedings of the Appeals Tribunal shall be held in public unless the Appeals Tribunal decides at its own initiative or at the request of either party, that circumstances require the proceedings to be closed.

Article 9

1. The Appeals Tribunal may order, inter alia, the following:

   (a) Rescission of the contested decision;

   (b) Specific performance;

   (c) Compensation;

   (d) Interest; and

   (e) Costs.

2. Where the Appeals Tribunal determines that a party has manifestly abused the appeals process, it may award costs against that party.

3. The Appeals Tribunal may not award exemplary or punitive damages.

4. The Appeals Tribunal may order interim measures and/or injunctive relief.

5. The Appeals Tribunal may remand a case to the Dispute Tribunal and decide to award payment in connection with its decision to remand due to procedural delay, which is not to exceed the equivalent of three months' net salary.

6. The Appeals Tribunal may refer appropriate cases to the Secretary-General or executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability.

Article 10

1. Cases before the Appeals Tribunal shall normally be reviewed by a panel of three judges and decided by a majority vote.

2. Where the President or any two judges sitting in a particular case consider that the case raises a significant question of law, at any time before judgement is

rendered, the case may be referred for consideration by the whole Tribunal. Quorum in such cases shall be five judges.

3. The judgements of the Appeals Tribunal shall be issued in writing and shall state the reasons on which they are based.

4. The deliberations of the Appeals Tribunal shall be confidential.

5. The judgements of the Appeals Tribunal shall be binding upon the parties.

6. The judgements of the Appeals Tribunal shall be final and without appeal, subject to the provisions of article 11 of the present statute.

7. The judgements of the Appeals Tribunal shall be drawn up, in any of the official languages of the United Nations, in two originals, which shall be deposited in the archives of the United Nations.

8. A copy of the judgement shall be communicated to each party to the case.

9. The judgements of the Appeals Tribunal shall be published and made generally available by the Registry of the Tribunal.

Article 11

1. Either party may apply to the Appeals Tribunal for a revision of a judgement on the basis of the discovery of a decisive fact which was, at the time the judgement was issued, unknown to the Appeals Tribunal and to the party claiming revision, provided that such ignorance was not due to negligence. The application must be made within one year of the date of the judgement.

2. Clerical or arithmetical mistakes may at any time be corrected by the Appeals Tribunal either on its own motion or on the application of any of the parties.

3. Either party may apply to the Appeals Tribunal for interpretation or an order for execution of a judgement.

Article 12

The present statute may be amended by decision of the General Assembly.